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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 785

SAN DIEGO ELECTRIC RAILWAY COMPANY,
A CORPORATION,
Appellant,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA

JURISDICTIONAL STATEMENT [1]

I. Nature of the Case

This action was commenced by appellant as plaintiff by the filing of a complaint against appellee as defendant in

[1] Record references herein are to the record in the District Court of Appeal of the State of California, Third Appellate District. The record in that court consists in general of a Clerk's Transcript (containing pleadings, findings and judgment of the trial court), Reporter's Transcript (containing oral testimony at the trial), a volume of Depositions (considered by the trial court as testimony in the case and certified to the appellate court as part of the record on appeal), appellant's original exhibits in the trial court (also certified to the appellate court as part of the record on appeal), briefs of the parties (to be included in the record to establish that the Federal questions were not only formally raised but vigorously argued in the state court), opinion and judgment of the District Court of Appeal,

the Superior Court of the State of California, in and for the County of Sacramento.[2]

The action is a statutory action under the Motor Vehicle Transportation License Tax Law [3] of the State of California to recover a tax paid by appellant under written protest. It is not questioned that appellant complied with all requirements of the statute as to the form and manner of payment and protest and filing suit against appellee in the proper court within the time allowed.

Appellant's protest and complaint both challenged the legality of the tax which was paid on two grounds, namely (1) that the statute, correctly interpreted, did not require payment of the tax, and (2) that if the statute does require payment of the tax the statute in its entirety is then void as in violation of the due process and equal protection clauses of Section 1 of the 14th Amendment to the Constitution of the United States.[4]

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appeal papers, court orders and proceedings. Appellant's case requires a practically complete record in order to show how the Federal questions were raised, and how they were urged at every stage of the proceedings, and to establish the fact of the unconstitutional discrimination complained of. All record references in this Jurisdictional Statement are to portions of the record which appellant is requesting the state court to certify and transmit to the Supreme Court of the United States and if a hearing is granted the record will be before the court.

References to the Clerk's Transcript, Reporter's Transcript, and volume of Depositions are abbreviated with page numbers, thus, Cl. Tr. 10, Rep. Tr. 20, Dep. 30.

[2] Cl. Tr. 1-18.

[3] 1941 Statutes, Chapter 39, page 590. This statute is now codified as Part 4 of Division 2 of the Revenue and Taxation Code of California and comprises Sections 9601-10501 inclusive of that code (Deering's Revenue and Taxation Code, Bancroft-Whitney Company, 1944). Amendments of the statute subsequent to 1941 are immaterial to this appeal. Section 9601 provides that "This part is known and may be cited as the Motor Vehicle Transportation License Tax Law).

[4] Complaint, paragraph VIII (Cl. Tr. 6).

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The trial court interpreted the statute as requiring payment of the tax and sustained its validity over the constitutional objections.

The District Court of Appeal affirmed the judgment of the trial court and the Supreme Court of California denied a hearing.[5]

II. Statement of Federal Questions Involved in This Appeal

The two Federal questions involved in this appeal are whether or not the Motor Vehicle Transportation License Tax Law of the State of California, as construed and applied to the facts of this case by final judgment of the highest court of said state in which a decision could be had, violates rights guaranteed to appellant by Section 1 of Amendment 14 to the Constitution of the United States *either* by (1) depriving appellant of its property without due process of law, *or* (2) denying to appellant the equal protection of the laws.

III. Dates of Judgment and Application for Appeal

This appeal is from a final judgment of the District Court of Appeal of the State of California, Third Appellate District, following denial of a petition for hearing by the Supreme Court of California.

The judgment of the District Court of Appeal was rendered on December 21, 1948, but it did not become final and effective until February 17, 1949, on which last mentioned date the Supreme Court of California made its order refusing a hearing in the case.

The said final judgment of said District Court of Appeal hereby appealed from is the final judgment rendered by the highest court of the State of California in which a decision could be had in this case and it became final for the purpose

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[5] Opinion of District Court of Appeal (Appendix "B" hereto).

of this appeal on February 17, 1949 (*American Railway Express Co.* v. *Levee*, 263 U. S. 19, 68 L. ed. 140).[6]

IV. Statutory Provision Sustaining Jurisdiction of Supreme Court of the United States

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States is Title 28, Section 1257, subdivision (2) of the United States Code.

V. Date of Application for Allowance of Appeal

The application for this appeal was presented to the Presiding Justice of the District Court of Appeal of the State of California, Third Appellate District, on April 18th, 1949.

VI. Opinions Delivered in the Case

The trial court rendered an opinion, a copy of which is attached hereto as Appendix "A". This opinion, which is almost entirely devoted to the question of the interpretation

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[6] The Superior Court of California is the trial court of general jurisdiction (Cal. Const., Art. VI, Sec. 5). The highest court of the state is the Supreme Court but there are also intermediate appellate courts designated as district courts of appeal. These courts are provided for and their jurisdiction established in Article VI, Sections 1, 2, 3, 4, 4a, 4b, and 4c of the California Constitution. It will be observed from Section 4 of Article VI that the Supreme Court of California was given appellate jurisdiction in this case and, for that reason, appellant took its appeal from the Superior Court directly to the Supreme Court of California. It is provided in Section 4c of Article VI, however, that the Supreme Court has power to order any cause pending before that court to be heard and determined by a District Court of Appeal and under that power the Supreme Court transferred this case for hearing and determination to the District Court of Appeal, Third Appellate District. Under Section 4c of Article VI the Supreme Court has power to grant a hearing after decision by a district court of appeal provided it exercises such power within thirty days in civil cases after the judgment of the district court of appeal becomes final. This power of the Supreme Court to grant a hearing after decision by a district court of appeal is purely discretionary and the Supreme Court has said that denial of a hearing does not even imply affirmative approval by the Supreme Court of the decision of the district court of appeal. (*People* v. *Davis*, 147 Cal. 346, 81 Pac. 718).

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of the statute, refers to appellant's argument based on Section 1 of Amendment 14 to the Constitution of the United States only by saying that "Other contentions of plaintiff are sufficiently met by the reply brief of the defendant." It would greatly expand this Jurisdictional Statement to attach copies of the briefs in the trial court merely to show what were the "other contentions of plaintiff" referred to in the opinion and we have concluded that it is not necessary to do so because the complaint and the Reporter's Transcript both amply disclose that appellant urged the Federal questions in the trial court.

The District Court of Appeal, Third Appellate District, rendered an opinion, a copy of which is attached hereto as Appendix "B". Although this opinion refers to and decides the Federal questions here presented, it does not specifically mention the due process and equal protection clauses of Section 1 of Amendment 14 to the Constitution of the United States and for that reason we have also included in the record appellant's briefs in that court to make it definite and certain that both the due process and equal protection clauses of the Fourteenth Amendment were urged upon the appellate court and that it was with reference to those specific provisions that the appellate court in its opinion stated "Appellant further argues that unless construed in conformity with its contentions the statute must be held to be unconstitutional", and then upheld the constitutionality of the statute. Even if the appellate court had not referred to any question of constitutionality, a decision affirming the judgment of the lower court would necessarily have decided the Federal questions adversely to appellant because said judgment could not have been affirmed without deciding said questions adversely to appellant.[7]

No other opinions have been rendered in the case.

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[7] "It is, of course, for us to examine whether questions of Federal law were necessarily, although only impliedly, adjudicated by the state court."

VII. Manner in Which Federal Questions Were Raised

Appellant first raised the due process and equal protection questions under the Fourteenth Amendment to the Federal Constitution in its written protest which accompanied the payment of the tax.[8] Indeed, this was necessary because the statute provides that the court shall not consider any grounds of illegality of the tax other than those set forth in the protest.[9] The written protest contains the following:

> "The tax is imposed to compensate the state for the use of public highways outside the limits of incorporated cities. If the correct interpretation of the statute is that all operators must pay the tax on the total amount of their gross receipts where any use of public highways in unincorporated territory is involved, even though the gross receipts of some operators are derived entirely from transportation in unincorporated territory and the gross receipts of other operators (such as Protestant) are derived almost entirely from transportation in incorporated territory and only to a negligible extent from transportation in unincorporated territory, the statute is to that extent oppressive and discriminatory against Protestant, and deprives Protestant of its property without due process of law, and denies to Protestant the equal protection of the laws, in violation of the provisions of Section 1 of Amendment XIV to the Constitution of the United States, and in violation of Section 13, Article 1 of the Constitution of the State of California, and it is a law of a general nature which does not have a uniform oper-

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(*Grand River Dam Authority* v. *Grand-Hydro*, decided November 22, 1948, 93 L. ed. 81, at page 86, citing previous decisions); *Hendersonville Light and Power Co.* v. *Blue Ridge Interurban Railway Co.*, 243 U. S. 563, 61 L. ed. 900.

[8] A copy of the protest is attached to the complaint as Exhibit "A" thereto (Cl. Tr. 8) and paragraph VIII of said protest raises appellant's Federal questions in detail (Cl. Tr. 16).

[9] Rev. & Tax. Code, Sec. 10279.

ation in violation of Section 11 of Article 1 of the Constitution of California."

Appellant advanced the same contention in its complaint in the Superior Court, as follows:

> "To the extent that said Motor Vehicle Transportation License Tax Law requires or permits the taxation of said entire amount of said gross receipts of $45,420.66, and denies to plaintiff the right to have said sum allocated as between incorporated and unincorporated territory in the manner proposed by plaintiff, and denies to plaintiff the right to pay said tax upon only that portion thereof derived from transportation in unincorporated territory, said law is oppressive and discriminatory against plaintiff and it deprives plaintiff of its property without due process of law, and it denies to plaintiff the equal protection of the laws, in violation of the provisions of Section 1 of Amendment 14 to the Constitution of the United States, and in violation of Section 13, of Article 1 of the Constitution of the State of California, and it is a law of a general nature which does not have a uniform operation, in violation of Section 11 of Article 1 of the Constitution of the State of California."

These contentions were urged upon the trial court at the trial.[10]

The Federal questions were specifically and elaborately argued to the District Court of Appeal in written briefs which we have included in the record to establish that fact.[11]

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[10] See page 5, *ante*.

[11] Briefs included in record because the opinion of the District Court of Appeal does not specifically mention that appellant urged both the due process and equal protection clauses of Section 1 of the 14th Amendment to the Constitution of the United States.

VIII. State Statute Involved

The state statute which is involved is the Motor Vehicle Transportation License Tax Law [12] which is a comprehensive tax statute of considerable length not necessary to be set out here in full. The sum and substance of the statute so far as here material is as follows:

A license tax is imposed upon any person engaged in the transportation of persons or property for hire or compensation by or upon a motor vehicle upon any public highway in the state at the rate of 3 per cent of the gross receipts from operations.[13] "Gross receipts" is defined broadly to include all receipts from the operation of motor vehicles entirely within the state and a proportion of the receipts from interstate operation based on mileage.[14] The statute contains the following provision:

> "Section 9653. This part does not apply to operators of motor vehicles operated exclusively within incorporated cities or between incorporated cities or incorporated cities and private property where no portion of the public highway outside the corporate limits of the cities is traversed in such operation.
>
> "The tax does not apply to the gross receipts derived from the transportation of persons or property wholly within incorporated cities or between incorporated cities or incorporated cities and private property or wholly on private property where no portion of the

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[12] 1941 Statutes, Chapter 39, page 590. This statute is now codified as Part 4 of Division 2 of the Revenue and Taxation Code of California and comprises Sections 9601-10501 inclusive of that code (Deering's Revenue and Taxation Code, Bancroft-Whitney Company, 1944). Amendments of the statute subsequent to 1941 are immaterial to this appeal. Section 9601 provides that "This part is known and may be cited as the Motor Vehicle Transportation License Tax Law).

[13] Rev. & Tax. Code, Secs. 9651, 9603(a).

[14] Rev. & Tax. Code, Sec. 9606.

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public highway outside the corporate limits of the cities or private property is traversed in such operation."

There are provisions for payment under protest in the event of claimed illegality and actions to recover, such as the present action.[15] Appellee is the state agency designated to administer the statute and against whom suits such as this are to be brought.[16]

The present Motor Vehicle Transportation License Tax Law is a modern codification of predecessor statutes having substantially the same provisions. The Supreme Court of California decided that a substantially identical predecessor statute provided for a license or privilege tax to provide a revenue with which to maintain and repair the public highways of the state *outside of incorporated cities* (*Bacon Service Corp.* v. *Huss,* 199 Cal. 21, 248 Pac. 235).

Operations which make no use of public highways outside incorporated cities are entirely exempt from the tax.[17]

If, however, the operation of a motor vehicle extends outside of a city into unincorporated territory to the slightest extent the *entire* fare paid for the *entire* trip both *inside* and *outside* the city becomes subject to the tax.[18]

IX. Statement of the Case

All statements of fact hereinafter made apply to the month of August, 1945, which is the tax period involved in this case, and were either found as facts by the trial court or established at the trial by uncontradicted evidence.

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[15] Rev. & Tax. Code, Secs. 10277-10279.

[16] Rev. & Tax. Code, Secs. 20, 9852-9855, 9876, 10050, etc. (1941 Statutes, Chapter 39, page 590).

[17] Rev. & Tax. Code, Sec. 9653, quoted on page 10, *ante.*

[18] This is the interpretation placed upon the statute by the decision of the District Court of Appeal herein appealed from.

Appellant is a common carrier of persons by automobile bus in the City of San Diego and neighboring territory. Appellant operates various established bus lines along regular routes, some of which are entirely within the limits of San Diego, but five of which traverse routes partly inside the city and partly outside. This case is not concerned with any of appellant's bus routes which operate entirely inside incorporated cities but is concerned exclusively with appellant's said five bus lines which operate partly inside and partly outside.

The following table shows, for each of appellant's said five bus lines, the linear miles operated in incorporated cities, the total linear miles operated and the percentage of linear miles operated in unincorporated territory outside any city:

Operation	Linear Miles in Cities	Linear Miles Outside Cities	Total Linear Mileage	Percentage of Linear Mileage Outside Cities
Route E	14.50	5.25	19.75	26.58
Route E–75	12.55	3.45	16.00	21.56
Routes Z & N	15.7	0.6	16.3	3.68
Route 65	72.1	1.1	73.2	1.50
Route 69	19.85	1.45	21.30	6.81

The following table shows, for each of said five bus lines, the bus miles operated in incorporated cities, the bus miles operated outside incorporated cities, the total bus miles operated, and the percentage of bus miles operated in unincorporated territory outside any city:

Operation	Bus Miles Operated In Cities	Bus Miles Operated Outside Cities	Total Bus Mileage Operated	Percentage of Bus Mileage Operated Outside Cities
Route E	141,044	19,823	160,867	12.32
Route E–75	702	193	895	21.56
Routes Z & N	183,238	5,460	188,698	2.89
Route 65	10,424	187	10,611	1.76
Route 69	4,329	331	4,660	7.10

It will be observed from the foregoing two tables that appellant's said five bus lines operate mostly in incorporated territory and to a very much less extent in unincor-

porated territory. The maximum linear mileage of any bus line in unincorporated territory is 26.58 per cent and the maximum bus mileage for any line is 21.56 per cent. The percentage in unincorporated territory for some of the other lines is as low as 1.50 per cent. The above tabulations were found by the trial court to be correct.[19]

For example, it was proved at the trial without contradiction that one of appellant's heavily patronized bus lines covers a route 12 miles in length from the business center of the City of San Diego to the business center of the neighboring City of La Mesa, and that on this route it traverses public highway in unincorporated territory for a distance of only 440 yards. Comparable situations were proved as to other heavily travelled lines.[20]

Prior to the commencement of this action appellee tax gatherer took the position that if, for example, one of appellant's passengers boarded a bus and rode a distance of 10 miles from the business center of the City of San Diego to the city boundary line and did not ride outside into unincorporated territory, the entire fare paid was *tax exempt;* but that if the passenger crossed the city boundary line for any distance whatever, however short, appellant became liable for a tax *on the entire fare paid* even if the passenger had ridden for 15 miles in tax exempt incorporated territory and for only 100 yards outside the city.[21]

Appellant took the position that in such a case the tax base (i.e., fare paid) should be apportioned between incor-

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[19] All facts and figures stated up to here were found by the trial court (Findings, Cl. Tr. 28-32).

[20] Plaintiff's Exhibit No. 1 at the trial (which was a part of the record on appeal in the state court and will be included in the record on appeal in this Court) is a map which shows the bus routes involved in this case, city boundary lines and distances; for convenience of reference all incorporated territory is colored yellow and unincorporated territory left white.

[21] The trial court found that appellee had rejected appellant's interpretation of the statute prior to the commencement of the action (Findings, Paragraph VI, Cl. Tr. 31).

porated and unincorporated territory on some proper basis (linear miles or bus miles or such basis as the court should determine to be proper) and that the tax should be applied to only that portion of the fare paid properly applicable to unincorporated territory. Appellant's argument to appellee was that since the Supreme Court of California has held that the tax is to provide a revenue to maintain and repair the public highways *outside* of incorporated cities,[22] and since operations *inside* incorporated cities are exempt,[23] the amount of the tax in the case of a ride in both kinds of territory should not be measured by the wholly unrelated circumstance of how far the passenger had happened to ride in tax exempt incorporated territory before he crossed the city boundary line. Appellant urged upon appellee that the statute is capable of the interpretation that such apportionment should be made and that if it is not capable of such interpretation it is then violative of those provisions of the Federal Constitution previously referred to.

Appellee rejected appellant's contentions and appellant accordingly paid part of its tax for the month of August, 1945, under written protest and commenced this action pursuant to the statute to recover such amount.[24]

The full amount of the tax which appellant paid for the month of August, 1945, is a full 3 per cent of the total amount of all fares paid by all passengers who took rides during that month which traversed both incorporated and unincorporated territory. The amount paid under protest is the difference between the tax so computed and the amount which the tax *would have been* if all fares had been prorated between incorporated and unincorporated territory

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[22] *Bacon Service Corp. v. Huss*, 199 Cal. 21, at p. 29, 248 Pac. 235; *In re Bush*, 6 Cal. (2d) 43, at p. 52, 56 Pac. (2d) 511.

[23] Rev. & Tax. Code, Sec. 9653.

[24] Findings, Paragraph VI, Cl. Tr. 31-32.

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on a bus mileage basis and the tax then applied only to that portion applicable to unincorporated territory.[25]

It was established at the trial without contradiction that, as a result of appellee's interpretation of the statute which has now been approved by the highest appellate court of the state in which a decision can be had, similar operators in the state pay widely different and much lower rates of tax for their use of public highways. Numerous operators operate almost exclusively in unincorporated territory between cities, whereas appellant operates almost exclusively in incorporated territory and to only a slight extent in unincorporated territory. If both classes of operators are required to pay the tax on the total fares paid, no matter what proportion of the rides are in each kind of territory, the net result is that appellant, for example, pays the same tax for the use of 440 yards of public highway between the cities of San Diego and La Mesa that a statewide operator such as Pacific Greyhound Lines, for example, pays for the use of approximately 12 miles of highway between cities.[26]

The discrimination which appellant proved at the trial appeared so clearly that the Deputy Attorney General who tried the case stated on the record that "• • • this is a case which couldn't be any stronger as a hardship case. I don't believe one could be conceived of"[27] and even the trial judge who sustained the validity of the statute under what he deemed compulsion of decisions of the Supreme Court

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[25] Findings, Paragraph V, Cl. Tr. 31.

[26] Appellant's witness Weeks, in his deposition, testified to the statewide operations of Pacific Greyhound Lines, Santa Fe Transportation Company, and other statewide operators whose operations are mostly in unincorporated territory (Dep. 35-37). He amplified this testimony at the trial and testified to plaintiff's Exhibit No. 7, which is a map showing the statewide operations of numerous statewide operators (Rep. Tr., pp. 64-66). This testimony and exhibit will be included in the record on appeal. They are uncontradicted in the record and conclusively establish the discrimination of which appellant complains.

[27] Rep. Tr. 36,

of California referred to it on the record as "extremely unjust."[28]

X. Statement of Grounds upon Which It Is Contended That the Questions Involved Are Substantial

The state statute here challenged by appellant provides for what is known as a highway user tax. The Supreme Court of California has held that the only purpose of the statute is to provide a revenue with which to maintain and repair the public highways of the state *outside of incorporated cities.*[29] The circumstance that the tax is levied upon gross receipts establishes that the general scheme of the statute is to make the amount of the tax vary according to the extent of use of the highways. The said holding by the Supreme Court of California as to the only purpose of the tax is doubly re-enforced by Section 9653 of the statute itself [30] which entirely exempts from the tax all operations inside cities. The general scheme of the statute, both on its face and as interpreted by the Supreme Court of California, is to tax persons who make use of public highways *outside cities* in proportion to the extent of the use which they make of such highways *outside cities.*

On the mere statement of the general nature and scheme of the statute anyone would say that it ought to con-

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[28] Rep. Tr. 109.

[29] *Bacon Service Corp.* v. *Huss,* 199 Cal. 21, at p. 29; *In Re Bush,* 6 Cal. 2d 43, at p. 52. In the *Bacon* case the Supreme Court said: "An examination of the entire statute discloses that the obvious and only purpose of the act was to provide a revenue with which to maintain and repair the public highways of the state *outside of incorporated cities* and that such revenue was to be obtained by the imposition of a license or privilege tax on the business of operating motor vehicles for hire over *such* public highways. The act is not a police measure in any sense. It provides for a license tax for revenue purposes only." (Emphasis supplied.) Both decisions refer to predecessor statutes substantially identical with the present Motor Vehicle Transportation License Tax Law.

[30] 1941 Statutes, at page 592.

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tain an express provision for prorating the tax base (i.e., fare paid) in the case of operations partly inside and partly outside cities. That it would have been feasible and workable to do so is apparent from the circumstance that the statute does provide for such a prorating as applied to interstate operations.[31] Appellant argued at every stage of the case in the state courts that such a prorating requirement may be fairly implied from the general nature and scheme of the statute and that the wording of Section 9653 does not render such interpretation unavailable—especially since tax statutes should be construed to be fair, reasonable and nondiscriminatory if possible.

The situation presented is not unlike that which came before this court under the interstate commerce clause in *Central Greyhound Lines, Inc.* v. *Mealey*, 334 U. S. 653, 92 L. Ed. 1235, in which this court practically suggested to the New York Court of Appeals that it give further consideration to the idea of interpreting a similar statute to require such prorating.

Appellant's argument in the state courts was without avail and appellant was relegated to its remedies under the Fourteenth Amendment to the Constitution of the United States.

Appellant contends that this statute, as so interpreted and applied to appellant's said five bus lines by the state courts, unreasonably and arbitrarily discriminates against appellant by requiring appellant to pay a tax for the use of public highways outside cities at a rate many times greater than the tax which other operators are required to pay. To take one of appellant's said five bus routes, for example, appellant proved at the trial by uncontradicted evidence that this route is 12 miles in length, all of which distance lies in-

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[31] Section 9606 (1941 Statutes, at page 591).

side the cities of San Diego and La Mesa except 440 yards.[32] For passengers taking that trip the statute, as interpreted by the state court, requires appellant to pay the tax on *the total fare paid!* Appellant also proved at the trial without dispute that there are numerous other operators in the state, furnishing interurban or statewide service, whose operations are almost entirely in unincorporated territory and to only a negligible extent in cities.[33] From this it necessarily follows that appellant pays approximately the same tax with respect to this 440 yards of public highway in unincorporated territory that the statewide operators pay for the use of 12 miles of such public highway. In the example mentioned, the statute as interpreted by the state court requires appellant to pay the tax at a rate approximately 48 times the rate paid by Pacific Greyhound Lines, for example, and the situation is comparable as to appellant's other operations and bus routes proved at the trial. This is what moved the trial judge to characterize the statute the way he felt bound to interpret it under decisions of the Supreme Court of California as extremely unjust[34] and what moved the Deputy Attorney General to state on the record at the trial that he didn't believe a case of any stronger hardship upon a taxpayer could be conceived of.[35]

The discrimination of which appellant complains is, in substance, that the statute steps up the rate and amount of appellant's tax according to the purely accidental and unrelated circumstance of how far the particular passenger happened to ride *in tax exempt incorporated territory* before he crossed the city boundary line and started to ride on a public highway in taxable unincorporated territory.

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[32] Plaintiff's Exhibit No. 1 and testimony of Weeks in his deposition and at the trial (Dep. 12-19).

[33] See note 24, *ante*.

[34] Rep. Tr., 109.

[35] Rep. Tr., 93-94.

The rate and amount of appellant's tax is stepped up because when the tax is paid on the total fare collected the inescapable result is that appellant pays a higher rate than the rate imposed upon operators who make a greater proportionate use of highways outside cities. The vice of this unfair and discriminatory method of stepping up the rate of a tax according to an unrelated and irrational collateral circumstance was pointed out by this court in a chain store tax case which came before this court under the same provisions of the Federal Constitution which appellant here invokes. *Liggett & Company* v. *Lee,* 288 U. S. 517, 77 L. Ed. 929. This court held that stepping up the rate of that particular tax solely on account of the chain crossing a county boundary line "violates the guarantees of the Fourteenth Amendment", evidently referring to the due process and equal protection clauses previously referred to in the court's opinion. In the case at bar the mere crossing of a city boundary line between tax exempt and taxable territory seems equally unsound as basis for stepping up *the rate* of the tax.[36]

This case is one of first impression so far as the validity of this kind of discrimination in this kind of tax statute is concerned, although we think that the principle for which appellant here contends was recognized and applied by this court in the chain store case of *Liggett Company* v. *Lee,* 288 U. S. 517, 77 L. Ed. 929, previously mentioned, in which decision the same provisions of the constitution were in-

[36] The dissenting justices in the *Liggett* case did not dissent from the proposition that a statute which steps up the rate of a tax according to an unrelated and irrational collateral circumstance violates the Fourteenth Amendment. They dissented *only* on the ground that they thought it had not been proved in the *Liggett* case that the crossing of a county boundary line by a chain of stores was, in fact, an unrelated and irrational collateral circumstance. In the case at bar there is clearly no room for any difference of opinion as to the irrationality and injustice of stepping up appellant's tax because the passenger had previously ridden for a considerable distance in *tax exempt territory.*

volved as appellant here invokes. There is no doubt as to the applicable principles of constitutional classification in tax cases which were stated by this court in *Louisville Gas Co.* v. *Coleman*, 277 U. S. 32, at page 37, 72 L. Ed. 770, as follows:

> "The equal protection clause, like the due process of law clause, is not susceptible of exact delimitation. No definite rule in respect of either, which automatically will solve the question in specific instances, can be formulated. Certain general principles, however, have been established in the light of which the cases as they arise are to be considered. In the first place, it may be said generally that the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances, *Kentucky Railroad Tax Cases*, 115 U. S. 321, 337; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 293, and that it applies to the exercise of all the powers of the state which can affect the individual or his property, including the power of taxation. *County of Santa Clara* v. *Southern Pac. R. Co.*, 18 Fed. 385, 388-399; *The Railroad Tax Cases*, 13 Fed. 722, 733. It does not, however, forbid classification; and the power of the state to classify for purposes of taxation is of wide range and flexibility, provided always, that the classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415; *Air-way Corp.* v. *Day*, 266 U. S. 71, 85; *Schlesinger* v. *Wisconsin*, 270 U. S. 230, 240. That is to say, *mere* difference is not enough: the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S. 150, 155. Discriminations of an unusual char-

acter especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision. Compare *Martin* v. *District of Columbia*, 205 U. S. 135, 139; *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232, 237."

It is appellant's contention on this appeal that it is beyond the bounds of reason and wholly without justification for the Motor Vehicle Transportation License Tax Law of California to make three classifications of operators, namely (1) those who operate in cities and are tax exempt, (2) those who operate in unincorporated territory and pay the full tax, and (3) those who operate partly in cities and partly in unincorporated territory *but must pay the full tax on their total gross receipts irrespective of the extent to which they operate in both kinds of territory.* Appellant contends that such an unfair and irrational classification violates the due process and equal protection clauses of the Fourteenth Amendment under well established applicable principles. The prorating of similar taxes on a mileage basis is familiar, fair and widespread and the State of California could just as easily make this statute fair so far as appellant is concerned as it has already made it fair to interstate operators by the provisions of Section 9606.[37]

The case of *Continental Baking Co.* v. *Woodring*, 286 U. S. 352, 76 L. ed. 1155, involved a similar statute of the State of Kansas which was likewise under attack as violative of both the due process and equal protection clauses of the Fourteenth Amendment. The plaintiffs were "private motor carriers of property" and the tax to which the statute subjected them was likewise a highway user tax but was imposed on a ton mile instead of a gross receipts basis.

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[37] In *Central Greyhound Lines* v. *Mealey*, 334 U. S. 653, 92 L. Ed. 1235, this Court said, referring to a mileage basis of apportioning this same kind of tax: "There is no question as to the fairness of the suggested method of apportionment (citing cases)."

It is evident that both a ton mile and gross receipts basis are well adapted to making a tax proportionate to the extent of use of the highway. The Kansas statute, like the California statute, exempted from the tax motor carriers operating wholly within any city or village of the state and further exempted "private motor carriers of property" operating within a radius of twenty-five miles beyond the corporate limits of any such city or village. The plaintiffs contended, apart from their contentions of unconstitutional discrimination, that the statute was void for uncertainty in view of the exemption applicable within a radius of twenty-five miles beyond the corporate limits of any city or village, but this court overruled that objection by accepting the lower court's interpretation of the statute that if a truck goes beyond the twenty-five mile limit "*only the excess is taxable.*" (286 U. S., at page 367.) It will be observed that this interpretation of the Kansas statute is the same as the interpretation of the California statute which appellant urged upon the California courts but which was rejected. After so interpreting the Kansas statute this court then took up and overruled the plaintiffs' contention that the broad exemption of all operations inside cities and villages renders the statute violative of the Fourteenth Amendment. It is to be observed that the Kansas statute which this court upheld in the *Continental Baking Co.* case is the same as the California statute *would have been* if the California courts had accepted the interpretation which appellant urged upon them. If the California courts had held that under the Motor Vehicle Transportation License Tax Law "*only the excess is taxable*" this appeal would not be pending. The burden of appellant's argument here is that *only the excess* gross receipts is constitutionally taxable when the passenger crosses the boundary line between tax exempt and taxable territory. Although the *decision* in the *Continental*

Baking Co. case is not precisely in point on this appeal we think that its implication supports appellant's position.

In the state courts appellee cited *Aero Transit Co.* v. *Georgia Public Service Commission*, 295 U. S. 285, 79 L. ed. 1439. The statute involved in that Georgia case did not levy the tax in an amount proportioned to the extent of use of the highway—the tax was not a gross receipts, ton mile, or other form of highway user tax. The tax was a flat annual tax of $25 for every vehicle operated irrespective of the extent of the use made of the state highways. The taxpayer contended that the tax was an unlawful burden on interstate commerce and also that it was violative of the equal protection clause of the Fourteenth Amendment on account of certain exceptions in the statute which are not relevant to this appeal. This court upheld the Georgia statute but we are unable to perceive any pertinence of that decision to the pending appeal. If the California Motor Vehicle Transportation License Tax Law, instead of taxing appellant the way it does, had imposed a tax in a fixed reasonable sum upon all alike who use public highways outside cities, appellant would have no constitutional cause of complaint under the *Aero Transit Co.* decision. But that is the very thing that the California statute here complained of does not do! The California statute is a highway user tax, and it taxes everyone *differently*, and also it contains an unreasonable and arbitrary discrimination in that it taxes appellant according to a more burdensome principle and method, and at a higher rate, than it taxes other operators who stand in precisely the same relation to the tax.

We realize that the foregoing brief statement of why we think that the questions involved in this appeal are substantial is inadequate as a full presentation of appellant's argument or as a brief, but we think we have shown that the ques-

tions involved are really substantial and merit full presentation and hearing.

Although the applicable principles of constitutional law are well established the case is one of first impression as to their application to this kind of discrimination in this kind of a tax statute.

XI. Conclusion

It is respectfully submitted that the Federal questions involved in this appeal are substantial and of exceptional public interest and importance; and that this court has jurisdiction of this appeal under the provisions of Title 28, Section 1257, subdivision (2) of the United States Code.

Dated: San Francisco, California, April 15, 1949.

Respectfully submitted,

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APPENDIX "A"

(Not Officially reported)

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SACRAMENTO

No. 71613 Dept. 2

SAN DIEGO ELECTRIC RAILWAY COMPANY, a corporation,
Plaintiff,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,
Defendant

Opinion of the Court

The Plaintiff is an operator as defined by Section 9603 of the Revenue and Taxation Code, engaged in the transportation of persons for hire within the City of San Diego and in some cases beyond the limits of that city and over the public highways to destinations outside of that city. As such operator the plaintiff was assessed under the provisions of Section 9651 of that Code. It paid the tax so levied, protesting that a substantial part of it was illegally collected. This action is to recover that portion of the tax so as aforesaid paid under protest. During the period covered by the assessment "plaintiff furnished local mass passenger transportation in the City of San Diego and neighboring cities and surrounding territory by means of nine street railway lines and twenty one automobile bus lines. This transportation service was entirely within the limits of incorporated cities, except that five of the automobile bus lines traversed public highways outside of incorporated cities for very small distances. Because of the operation of the said five bus lines plaintiff was subject to payment of the Motor Vehicle Transportation License Tax. This case does not involve any tax upon plaintiffs receipts from its street railway lines, nor from any of its bus lines

which operate entirely within incorporated cities. Neither does it involve any tax upon plaintiffs receipts from passengers who ride on plaintiffs said five interurban bus lines but whose rides are wholly within the limits of incorporated cities." Page 1, Plaintiff's Opening Brief.

Section 2653 of the Act under which the tax in this case was levied provides four exceptions to the general rule, under which the tax does not apply. Plaintiff claims to come within these exceptions, particularly the one which states that the tax does not apply to gross receipts derived from the transportation of persons wholly within incorporated cities. Its contention is that where a passenger travels from a point within an incorporated city through and beyond the limits of such a city over a portion of a public highway to his destination, that that portion of the charge for his transportation properly apportionable to the distance traveled by the passengers wholly within the limits of the incorporated city should not be taxed. In support of this position plaintiff contends that the second clause of Section 9653 has no proper application to that portion of the first clause in that section relating to the exemption of tax upon the gross receipts derived from transportation wholly within the limits of an incorporated city and claims that properly read the law provides so far as this case is concerned as follows: "The tax does not apply to gross receipts derived from the transportation of persons or property wholly within incorporated cities."

This simplification of the statutes phraseology may be accepted but even so it does not support plaintiffs contention. That contention is that so read the statute should be held to provide that *that portion* of a passengers fare which might be held to have been chargeable to his transportation wholly within the city limits was to be exempt from taxation. The statute makes no mention nor does it suggest reference to portions of journeys. There is not a single fare among all of those making up the gross receipts which were taxed here, paid by a person whose transportation was "wholly" within the incorporated limits of any municipality. All of the gross receipts taxes in this case were derived from persons who were transported in a single

journey over both city streets and public highways. The word "wholly" in the Statute relates to the word "transportation", and the transportation which is here taxed was in no single instance wholly within the city limits of the City of San Diego. Even admitting the question of the statutes construction to be doubtful plaintiff is claiming the benefit of an exception in which case the familar rule is that such provisions are strictly construed and that one who claims the benefit of an exception must bring himself clearly within it.

"Ordinarily a strict or narrow construction is applied to statutory exceptions to the operation of laws. This rule is particularly applicable where the statute is promotive of the public welfare, or where in general the law itself is entitled to a liberal construction." 50 Am. Jurisprudence, bottom of page 451-452.

That the act of which Section 2653 is a part is such an act as is mentioned in the final words of the above quotation is made so by its own terms.

Section 2652 of the Act provides: "For the purpose of the proper administration of this part and to prevent evasion of the tax, it shall be presumed that the gross receipts from all operation of operators are subject to the tax until the contrary is established." Revenue and Taxation Code.

Other contentions of plaintiff are sufficiently met by the reply brief of the Defendant.

The Judgment will be for the Defendant.

Dated: Aug. 26, 1947.

Peter J. Shields,
Judge.

Endorsed: Filed Aug. 26, 1947.

APPENDIX "B"

(Officially reported in 89 Advance California Appellate Reports, at page 325)

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE THIRD APPELLATE DISTRICT

(Sacramento)

Civ. No. 7509
Sac. No. 5918

SAN DIEGO ELECTRIC RAILWAY COMPANY, a Corporation,
Plaintiff and Appellant,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,
Defendant and Respondent

Opinion

Appellant San Diego Electric Railway Company is a corporation engaged in the transportation of passengers by street car and by bus in the city of San Diego. Five of its bus lines extend for short distances beyond the incorporated limits of the city. The State Board of Equalization, hereinafter referred to as the Board, imposed motor vehicle transportation license taxes upon the total fares paid by passengers who in one continuous trip on such buses traversed city streets as well as public highways outside incorporated territory. Appellant paid the tax for the month of August, 1945, under protest and brought this action for the recovery of a portion thereof, claiming that under the relevant statutes it should be required to pay such tax only upon the portion of such fares attributable to transportation of such passengers outside incorporated areas—in other words, that the tax statutes should be interpreted to require an apportionment of the fares received from passengers who, in one continuous trip, traversed public highways both outside and inside incorporated

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areas, in accordance with the ratio between the distance traveled in the unincorporated territory to the whole distance traveled.

The trial court rendered judgment for the Board and this appeal followed.

So far as relevant, the substance of the applicable statutes is as follows:

A license tax at the rate of 3 per cent of the gross receipts (Rev. & Tax. Code, sec. 9651) is imposed upon any person engaged in the transportation of persons or property for hire or compensation by or upon a motor vehicle upon any public highway in the state (Rev. & Tax. Code, sec. 9603).

Gross receipts are to include all receipts from the operation of motor vehicles entirely within the state, and a proportion, based on mileage, from interstate operations (Rev. & Tax. Code, sec. 9606).

Section 9652 of said code reads:

> "For the purpose of the proper administration of this part and to prevent evasion of the tax it shall be presumed that the gross receipts from all operations of operators are subject to the tax until the contrary is established."

Section 9653 (with which this appeal is particularly concerned), provides:

> "*Operators and receipts exempted.* This part does not apply to operators of motor vehicles operated exclusively within incorporated cities or between incorporated cities or incorporated cities and private property where no portion of the public highway outside the corporate limits of the cities is traversed in such operation.
>
> "The tax does not apply to the gross receipts derived from the transportation of persons or property wholly within incorporated cities or between incorporated cities or incorporated cities and private property or wholly on private property where no portion of the public highway outside the corporate limits of the cities or private property is traversed in such operation."

Prior to 1939 the only provision of the law on that subject read as follows:

> "This act shall not apply to motor vehicles operating exclusively within incorporated cities or towns, nor shall it apply to such vehicles operating between incorporated cities or towns where no portion of the public highway outside of the corporate limits of said cities or towns is traversed in said operation, nor shall this act apply to motor vehicles operated exclusively off of public highways in this State." (Sec. 22 of License Tax Act of 1933 (Stats. 1933, p. 928) as amended by Stats. 1937, p. 1932.)

In 1939 the provision was amended to read as follows:

> "This act shall not apply to operators of motor vehicles operated exclusively within incorporated cities or between incorporated cities or incorporated cities and private property where no portion of the public highway outside the corporate limits of such cities is traversed in such operation, and the tax imposed hereunder shall not apply to the gross receipts derived from the transportation of persons or property wholly within incorporated cities or between incorporated cities or incorporated cities and private property or wholly on private property where no portion of the public highway outside the corporate limits of such cities or private property is traversed in such operation." (Stats. 1939, p. 2659.)

In 1941 section 9653 was enacted to read as above set forth.

The trial court relied upon *In re Bush*, 6 Cal. 2d 43 (1936), and *Bekins Van Lines, Inc.* v. *Johnson*, 21 Cal. 2d 135 (1942). Appellant apparently concedes that those decisions were conclusive under the statutes as they read prior to the enactment of the second paragraph of section 9653, supra, but argues that by said paragraph the legislature intended to and did provide for the proration which they claim in this case.

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We find no merit in this contention. No change in the language of the statutes has been made which compels such conclusion; and if the legislature intended, by the slight changes made in the wording of the law, that in determining gross receipts subject to taxation, only that portion of a single fare attributable to transportation in unincorporated territory should be taxed, no reason appears why cryptic language should have been used. Where prorationing has been intended, as provided in section 9606, supra, the legislature has so provided in definite terms; and its failure to provide for the apportionment of gross receipts from intercity travel on a mileage basis, when it specifically so provided regarding interstate travel, is convincing evidence that no such result was intended. It is beyond the province of courts to read into section 9653, supra, language which, we must assume, was intentionally omitted. Furthermore, that the legislature did not intend to provide for prorationing as claimed is indicated by section 9652, supra. Also section 9653 is an exemption statute, and as such is subject to the rule that exemptions from taxation are to be strictly construed against the taxpayer. (*Cypress Lawn Cemetery Assn.* v. *San Francisco*, 211 Cal. 387, 390; *Bay Cities Transp. Co.* v. *Johnson*, 8 Cal. 2d 706, 712; *Miller* v. *McColgan*, 17 Cal. 2d 432, 441-442; *Robertson* v. *Johnson*, 55 Cal. App. 2d 610, 614.)

The evidence in the case shows that the Board, both before and since 1941, has imposed the tax in the same manner upon all bus lines throughout the state whose operations extend into unincorporated areas, of which there are many whose factual situation is comparable to appellant's. This administrative interpretation of the law, while not conclusive, is persuasive when the courts are called upon to construe statutes. See *Koenig* v. *Johnson*, 71 Cal. App. 2d 739, 755; 23 Cal. Jur. sec. 152, p. 776. Also the testimony shows that the changes made in 1941 were intended to clarify rather than to change the existing law.

Therefore, our conclusion is that the decisions in *In re Bush* and *Bekins Van Lines, Inc.*, supra, are applicable and controlling in this case. Also see *California Motor Transport Co., Ltd.* v. *State Board of Equalization*, 31 Cal.

2d 217; *Southern California Freight Lines* v. *State Board of Equalization*, 72 Cal. App. 2d 26, and *Winkler Trucking Co.* v. *McAhren*, 60 Ariz. 225, 133 Pac. 2d 757, 759.

Appellant further argues that unless construed in conformity with its contentions the statute must be held to be unconstitutional. But there is no such distinction between the added portion of section 9653 and the prior enactments as to render the later addition invalid. And as in both the *Bush* case (6 Cal. 2d at p. 56) and the *Bekins* case (21 Cal. 2d at pp. 141-142) unconstitutionality was denied, it must be so denied in this case.

Statutes are presumed to be constitutional (*People* v. *Keith Ry. Equip. Co.*, 70 Cal. App. 2d 339, 358, and cases there cited); and in view of the statements of the Supreme Court in the *Bush* and *Bekins* cases it is not for this court to say that the section under attack is unconstitutional.

If, as appellant claims, the tax as imposed by the Board results in casting an unfair burden upon it, its application for relief should be addressed to the legislature and not to the courts. And if that body intended by its amendment to section 9653 to effect the results contended for by appellant, it should clarify its intention by clear and certain language.

The judgment is affirmed.

ADAMS, P. J.

We concur: PEEK, J., THOMPSON, J.

(Endorsed): Filed Dec. 21, 1948.

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 785

SAN DIEGO ELECTRIC RAILWAY COMPANY, a corporation,
Appellant,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,
Respondent.

Appeal from the District Court of Appeal of the State of California in and for the Third Appellate District

Appellant's Brief Opposing Motion by Appellee to Dismiss or Affirm

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. .....

SAN DIEGO ELECTRIC RAILWAY COMPANY, a corporation,

Appellant,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,

Respondent.

Appeal from the District Court of Appeal of the State of California in and for the Third Appellate District

Appellant's Brief Opposing Motion by Appellee to Dismiss or Affirm

I. OUR JURISDICTIONAL STATEMENT IS NOT CHALLENGED BY APPELLEE EXCEPT ONLY AS TO THE MERITS OF THE FEDERAL QUESTIONS.

Appellee does not question anything in our Jurisdictional Statement except only our position that the Federal

questions are substantial and were decided erroneously by the state court.

We assume that our Jurisdictional Statement will be considered along with this brief in connection with appellee's motion to dismiss or affirm, and we will therefore not repeat here any of the contents thereof.

II. THE INTIMATION IN APPELLEE'S ARGUMENT THAT THE FEDERAL QUESTIONS WERE NOT STRONGLY RELIED ON BY APPELLANT IN THE LOWER COURT IS CONTRARY TO FACT.

Appellee states in its argument that appellant's "primary contention" in the lower courts was that the statute should be so interpreted as to permit an apportionment of the fare, and that "the main burden of appellant's position here, however, is that the statute is discriminatory and unconstitutional." There is an intimation here that we did not strongly rely on the Federal questions in the state courts and are now seriously pressing them for the first time.

There is no foundation for the statement that our "primary contention" in the lower courts was the interpretation of the statute. Appellant's Opening Brief[1] in the District Court of Appeal devotes only five pages at the *end* to argument of the interpretation of the statute, and all the rest of the argument in that forty-two page brief is devoted to the constitutional questions and the subject of discrimination. Moreover, an examination of appellant's argument on the interpretation of the statute will

[1]Appellant's Opening Brief in the District Court of Appeal is included in the record on appeal in this court.

make clear that the argument was subsidiary to the constitutional argument and was made mainly for the purpose of pointing out to the court a possible way to avoid declaring the statute unconstitutional.

We would not wish this court to derive the erroneous impression that the constitutional questions in this case have ever at any time been subordinated by appellant to any other point.

III. IT IS NO ANSWER TO A CHARGE THAT A TAX STATUTE DISCRIMINATES AGAINST A CLASS TO REPLY THAT THE TAX ADMINISTRATOR IN ADMINISTERING THE STATUTE DISCRIMINATES IMPARTIALLY AGAINST ALL MEMBERS OF THAT CLASS.

In defense of the statute appellee argues that the Tax Administrator has applied the tax in the same way to all bus operators in California, including operators in urban areas similar to San Diego.

It may be conceded that the Tax Administrator always did what the statute (as interpreted by the state court) prescribes.

But we are not here complaining of anything that the Tax Administrator did or did not do. We are complaining of the *statute itself*. The fact that the Tax Administrator collected the tax in the same way from appellant and all similar operators shows only that he carried out the discrimination which the statute creates.

The statute itself discriminates between two classes of taxpayers, and appellant is a member of the class discriminated against. It is immaterial that there may not be discrimination within either class.

IV. INCIDENTAL RECEIPTS AND COMPARATIVE RATE SCHEDULES ARE IMMATERIAL IN THIS CASE AND APPELLANT'S PROOF OF DISCRIMINATION WAS FULL AND COMPLETE.

A. Appellee Argues That Appellant Should Have Proved All Incidental Receipts and All Fares Paid.

In our Jurisdictional Statement we set forth our contention that the statute provides for a highway user tax, upon the principle of tax according to the extent of use of highways outside cities. We also set forth our contention that, if the tax is of that nature, all passenger bus operators who use highways outside cities must be taxed at the same *rate* without discrimination.

Appellee says there are "several fallacies" in our argument. In the first place, appellee says, the tax is not a tax according to use because, as appellee points out, certain *statewide truck operators,* who carry *freight only,* derive some incidental taxable receipts from accessorial services which receipts may not be in direct proportion to highway use. In the second place, appellee says, we failed to present "comparative rate schedules or other evidence" demonstrating that in fact appellant bore a greater burden of tax than did other operators.

Let us consider these claimed fallacies in the order stated.

B. Passenger Bus Operators Have No Incidental Receipts and Such Receipts Would Be Immaterial in Any Event.

On its face, the statute provides for a tax according to extent of use of highways outside cities. The fact that the tax is levied on "gross receipts" plainly establishes the principle of tax according to extent of use. The fact of exemption of operations *inside* cities plainly establishes

that it is the use of highways *outside* cities which is to measure the amount of the tax.

Appellee nevertheless says it is fallacious to say that this is a tax according to use because of incidental taxable receipts from accessorial services.

The answer to appellee's argument, however, is that *passenger bus* operators perform no such accessorial services and have no such incidental taxable receipts, and the California decisions cited by appellee[2] have no application to *passenger bus* operations. Under the statute receipts to be taxable must be derived "from the operation of motor vehicles," and it is difficult to conceive of any incidental receipts of a passenger bus operator which would be taxable within the words of the statute or the principle of the decisions cited by appellee.

Appellee's argument that the tax is not one according to use lacks force *even as to statewide freight carriers*, because the statute taxes them all alike and thus preserves their same relative positions and carries out the principle of tax according to use.

In any event, the entire subject of taxable incidental receipts is trivial in relation to the magnitude of the discrimination of which appellant complains. Appellant complains of discrimination by which it is taxed at a rate many times the rate imposed upon others, as a result of which the incidental receipts would have to exceed very

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[2]*Bekins Van Lines, Inc. v. Johnson* (1942), 21 Cal.2d 135, 130 Pac.2d 421; *Southern California Freight Lines v. State Board of Equalization* (1945), 72 Cal. App.2d 26, 163 P.2d 776. In the operation of passenger buses there is nothing comparable to the loading, unloading, pick-up and delivery services performed by truck operators and consequently there are no comparable incidental revenues from such services.

substantially all the rest of the receipts put together before the effect on the picture of discrimination would be perceptible.[5] It would be idle and unnecessarily burdensome to show such incidental receipts, even if there were any, when the showing could not possibly alter the picture of discrimination.

We think there is no "fallacy" in appellant's argument on account of any incidental receipts.

C. Comparative Rate Schedules Are Immaterial to Appellant's Claim of Discrimination.

It was no necessary part of appellant's case to present comparative rate schedules of itself and other operators as basis for a calculation to show the *precise* degree of discrimination between appellant and each other operator. That is so for two reasons.

---

[5]As contrasted with appellant's small proportionate use of highways outside cities (Findings, Paragraph IV, (Cl. Tr. 29) and Plaintiff's Exhibit 1) see the *uncontradicted* testimony of appellant's witness Weeks to the effect that the following passenger bus operators operate the following percentages of their total operations in unincorporated territory (Rep. Tr. 64-66):

Operator	Per Cent
Pacific Greyhound Lines	90
Airline Bus Company	93
Burlington Trailways	94
Citizens Transit Company	66
Feather River Stages	93
Los Angeles-Trona Stages	96
Moyer's Stages	92
Overland Greyhound Lines	94
Santa Fe Trailways	93
Yosemite Park and Curry Company	98

If appellant pays the full amount of the tax on the *total fare collected* for a ride which is only 5 or 10 per cent in unincorporated territory, and Pacific Greyhound Lines pays the *same rate* on the total fare collected for a ride which is *90 per cent* in unincorporated territory, it follows by simple arithmetic that for the use of highways outside cities appellant has been taxed at a rate many times the rate charged Pacific Greyhound Lines.

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In the *first* place, this is a highway user tax and appellant is complaining of discrimination in the *rate* of tax to which it is subjected—not in the total amount. The precise fares paid by passengers, as well as the exact amount of gross receipts of the operator, are alike immaterial to such claim of discrimination. We have proved a discrimination in *rate* as between appellant and other operators, and it is immaterial to what volume of business that rate is applied or what were the individual fares making up the total taxable gross receipts.

In the *second* place, the discrimination here complained of is so great that no difference in fares per passenger mile could alter it.[4] Appellant points to discrimination against it of hundreds of per cent in *rate,* and comparative fares and total gross receipts have no bearing on that kind of discrimination.

We see no fallacy in our argument based on omission to supply data which could in no way alter the picture.

D. Appellant's Proof of Discrimination Was Full and Complete.

Appellant's proof of discrimination was full and complete without any detail as to incidental revenues or particular fares.

Appellant proved that Pacific Greyhound Lines, for example, is taxed no more for the use of twelve miles of highway in unincorporated territory than appellant is taxed for the use of four hundred forty yards in such territory, which establishes that in that instance appellant is taxed at forty-eight times the rate paid by the other operator. In the face of such discrimination the little matters to which appellee directs attention are not worth mentioning.

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[4]See note 3 ante.

V. THE DISCRIMINATION RELIED ON BY APPELLANT IS IN FAVOR OF THE STATEWIDE OPERATORS. APPELLANT IS NOT ATTACKING THE EXEMPTION OF CITY OPERATIONS.

In our Jurisdictional Statement we discussed this court's decision in the *Aero Transit Co.*[5] case which appellee still relies on. That decision is not applicable here because we have here a tax according to use, and not a tax in a fixed amount to be paid by all alike. If we concede that the principle of the *Aero Transit Co.* decision is not limited to a tax in a fixed amount to be paid by all alike, but applies to *any* non-discriminatory tax, that merely brings us back to the question of whether or not this particular tax is discriminatory. If the tax is *discriminatory* it makes no difference whether you call it a highway user tax or something else. We fail to see in what way the *Aero Transit Co.* decision advances the solution of the problem here presented.

The ultimate question is not—Is the tax a highway user tax?—but is—Is the tax discriminatory? Whatever you call the tax it taxes appellant at a higher rate for the use of highways outside cities than it taxes other operators.

It is no answer to say that it taxes appellant at the same rate if you take into account highways inside as well as outside cities. The statute *exempts* operations inside cities, and when it taxes a city operator for the use of *twelve miles* of highway because the operator carries a passenger *four hundred forty yards* over the city boundary line, the truth and fact of the matter is that the city operator has to pay a tax for the use of *twelve miles* of highway in order to use a *quarter of a mile* of highway.

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[5] *Aero Mayflower Transit Co. v. Georgia Public Service Commission* (1935), 295 U.S. 285, 79 L.ed. 1439.

We do not here complain of the tax exemption of city operations. The discrimination to which we point is the discrimination between appellant and the statewide operators. The same act of carrying a passenger across a city boundary line, which is the occasion for imposition of the tax upon *all* operators, imposes a tax upon appellant at a *very high rate* and a tax upon the statewide operators at *a very much lower rate.*

VI. THERE IS NO CALIFORNIA DECISION WHICH UPHOLDS THE CONSTITUTIONALITY OF THE STATUTE AGAINST THE CHARGE OF DISCRIMINATION MADE BY APPELLANT IN THIS CASE.

A. General Summary of California Decisions Cited by Appellee.

Appellee cites several decisions of the Supreme Court of California as sustaining the constitutionality of the statute here challenged.[6] In *none* of those decisions was the particular predecessor statute challenged by any claim of discrimination similar to that here urged by appellant. All said decisions relate to tax years prior to the growth and development of urban mass passenger transportation by automobile bus, and prior to the time when it made any difference to anybody whether the tax base was prorated between incorporated and unincorporated territory or not.[7]

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[6] *In re Bush* (1936), 6 Cal.2d 43, 56 Pac.2d 511; *Bacon Service Corp. v. Huss*, 199 Cal. 21, 248 Pac. 235; *In re Schmolke*, 199 Cal. 42, 248 Pac. 244; *Bekins Van Lines, Inc. v. Johnson* (1942), 21 Cal.2d 135, 130 Pac.2d 421.

[7] The *Bacon* and *Schmolke* cases related to the years 1924 and 1925; and the *Bush* and *Bekins* cases to the years 1935 and 1936. The trial court indicated judicial notice of the origin and growth of the business (Rep. Tr. 64-66) and this court will probably similarly judicially notice that urban mass passenger transportation by automobile bus is a very recent development.

B. The Bacon and Schmolke Cases.

Referring first to the two early decisions in the *Bacon* and *Schmolke* cases, in both of which this court dismissed writs of error, no constitutional question in any way resembling appellant's claim of discrimination was presented or considered. Those cases relate to the years 1924 and 1925 respectively, which years were long prior to any such thing as urban mass transportation by automobile bus. Neither of those cases goes as far as this court itself went in the *Continental Baking Co.*[8] case in upholding the exemption from such a tax of all operations inside incorporated cities.

C. In re Bush, 6 Cal.2d 43, 56 Pac.2d 511.

The leading California case on the constitutionality of this statute is the *Bush*[9] decision upon which the District Court of Appeal relied in affirming the judgment of the trial court and from which appellee quotes in its argument. In the *Bush* decision the Supreme Court of California went as far as this court itself went in the *Continental Baking Co.* case and no farther, i.e., it upheld the statute against the claim that it was discriminatory because it exempted motor vehicles operated exclusively within incorporated cities.

There was not involved in the *Bush* case the contention which appellant makes here, namely that if operations inside cities are tax exempt the tax base should then be prorated in the case of operations *partly inside* and *partly outside* cities.

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[8]*Continental Baking Co. v. Woodring*, 286 U.S. 352, 76 L.ed. 1155.

[9]*In re Bush* (1936), 6 Cal.2d 43, 56 Pac.2d 511.

There are two very good reasons why the discrimination of which appellant here complains was not passed upon or in any way involved in the *Bush* case. In the first place, the *Bush* case related to operations in the year 1935, which was prior to the time when it made any difference in money to anyone whether the tax base was prorated between incorporated and unincorporated territory or not. In the second place, the operator in the *Bush* case was in exactly the *opposite* situation to that of appellant, i.e., he operated almost exclusively in *un*incorporated territory and to only an insignificant extent in the little city of Taft.[10] Bush had not the slightest interest in the discrimination of which appellant here complains and never even suggested it in his lawsuit. If Bush had raised the same question which appellant here presents, and even if he had won his case, he would have paid almost exactly the same amount of taxes.

D. Bekins Van Lines, Inc. v. Johnson, 21 Cal.2d 135, 130 Pac.2d 421.

The *Bekins*[11] decision adds nothing whatever to the *Bush* decision. As the Supreme Court said in the excerpt from its opinion quoted by appellee, no constitutional question was even raised in that case. The court's observation on the constitutionality of the statute was pure dictum based on the *Bush* case, without benefit of argument or occasion for reflection.

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[10]The record on file in the Supreme Court in the *Bush* case discloses that Bush operated a bulk oil delivery station in the little city of Taft, in connection with which he operated a delivery truck throughout surrounding unincorporated territory of approximately 1400 square miles in extent.

[11]*Bekins Van Lines, Inc. v. Johnson* (1942), 21 Cal.2d 135, 130 Pac.2d 421.

The discrimination of which appellant here complains has never been considered by any California court in any reported decision until the present case. None of the three California courts to which this case was presented wrote an opinion on the constitutional question. The District Court of Appeal said "it is not for this court to say" and the Supreme Court denied a hearing without any opinion at all.

VII. LIGGETT & COMPANY v. LEE, 288 U.S. 517, 77 L.ed. 929.

In our Jurisdictional Statement we cited this court's decision in *Liggett v. Lee* for the very broad general proposition that it is discriminatory and violative of the Fourteenth Amendment for a statute to step up the rate of a tax against a particular class of taxpayers because their operations happen to cross a boundary line between political subdivisions where such crossing affords no reasonable basis for the classification. It seems to us that there is a certain analogy between our case and *Liggett v. Lee* because in our case it is the circumstance of appellant's passenger crossing a city boundary line that subjects appellant to a higher rate of tax on the fare paid than statewide operators are subjected to for their use of the same highways.

Appellee says that *Liggett v. Lee* "possibly would be of some interest" if appellant were claiming discrimination in favor of city operators instead of state operators. It is true that the particular discrimination involved in *Liggett v. Lee* was between a store chain which crossed a county boundary line and one confined to a single county, but the broad principle for which we cited the decision is still applicable. It is true we are not here

claiming discrimination in favor of the city operators, but when appellant's passenger crosses the city boundary line it steps up the rate of appellant's tax on the fare over that of the statewide operators just as clearly as the rate of tax was stepped up in *Liggett v. Lee.*

Appellee further argues that the principle of *Liggett v. Lee* is of little value in view of such decisions as the *Aero Transit Co.*[12] decision. We have elsewhere pointed out that the *Aero Transit Co.* decision applies only to a tax in a definite fixed amount, to be paid by all alike, and has no application to a tax on gross receipts which subjects one class of operators to a much heavier burden than it subjects others.

VIII. CONTINENTAL BAKING CO. v. WOODRING, 286 U.S. 352, 76 L.ed. 1155.

Appellee does not in any way dispute the discussion of the *Continental Baking Co.* decision in our Jurisdictional Statement. We ourselves pointed out that the matter of the interpretation of the Kansas statute was raised by the plaintiffs "apart from their contentions of unconstitutional discrimination."[13]

The fact remains, however, that the Kansas statute which this court upheld was very carefully interpreted *not* to contain the very discrimination of which we complain in the California statute.

This court's decision in the *Continental Baking Co.* case upheld the exemption of operations inside cities, **but only** *in a statute which provided for prorating the tax in the case of operations partly inside and partly outside cities.*

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[12]*Aero Mayflower Transit Co. v. Georgia Public Service Commission* (1935), 295 U.S. 285, 79 L.ed. 1439.

[13]Jurisdictional Statement, page 25.

IX. THE VERY NATURE OF APPELLEE'S ARGUMENT ESTABLISHES THAT THE FEDERAL QUESTIONS ARE SUBSTANTIAL WHATEVER MAY BE THE ULTIMATE DECISION ON THE MERITS.

A very good reply to appellee's argument as a whole is the kind of discussion it necessarily leads to.

This brief is not a full presentation of the Federal questions on their merits, but is merely an argument in opposition to a motion to dismiss or affirm.

We understand that it is incumbent on us *now* to show *only* that the Federal questions raised are substantial. The kind of discussion that appellee's argument necessarily opens up is the best reply to a motion to dismiss or affirm.

X. PRAYER.

We feel we have shown that the Federal questions raised are substantial and of exceptional public interest and importance; and that this court has jurisdiction of this appeal under the provisions of Title 28, Section 1257, subdivision (2) of the United States Code; and that appellee's motion to dismiss or affirm should be denied; and that this court should note its jurisdiction herein and set the case for hearing.

Dated: San Francisco, California, May 16th, 1949.

Respectfully submitted,

FORREST A. COBB,
WILLIAM L. HOLLOWAY,
C. COOLIDGE KREIS,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 785

SAN DIEGO ELECTRIC RAILWAY COMPANY,
A CORPORATION, *Appellant,*

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA

APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE THIRD APPELLATE DISTRICT

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

FRED N. HOWSER,
Attorney General of the State of California;
JAMES E. SABINE,
Deputy Attorney General of the State of California;
IRVING H. PERLUSS,
Deputy Attorney General of the State of California,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

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No. 785

SAN DIEGO ELECTRIC RAILWAY COMPANY,
A CORPORATION,
Appellant,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,
Appellee

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

MAY IT PLEASE THE COURT:

Appellee in the above entitled cause moves the Court to dismiss this appeal or to affirm the judgment below for the following reason:

There is no substantial federal question presented as a basis of jurisdiction in this Court, because appellant has not demonstrated that it has suffered unconstitutional or discriminatory tax treatment.

WHEREFORE, appellee moves the Court to dismiss the appeal in this cause for want of a substantial federal ques-

tion or, in the alternative, to affirm the judgment of the District Court of Appeal of the State of California in and for the Third Appellate District from which this appeal is taken, for the reason that appellant has not demonstrated that it has suffered unconstitutional or discriminatory tax treatment.

Argument in support of Motion, Statement of the Case, Including the Facts

This case involves the California Motor Vehicle Transportation License Tax Law[1] which imposes a license tax at the rate of three per cent upon the gross receipts of operators of motor vehicles engaged in the transportation of persons or property within the State of California. There are certain legislative exceptions from the imposition of the tax including transportation exclusively within incorporated cities or between incorporated cities where no portion of the public highway outside the corporate limits of the cities is traversed in the operation.[2]

During the month of August, 1945, appellant engaged in the business of transporting passengers by street railway lines and automobile bus lines in the city of San Diego and its environs. Five of such automobile bus lines traversed highways outside of incorporated cities and appellant has conceded, as it must, that it was an operator and subject to tax within the meaning of the applicable statute.

The gross receipts of appellant derived from the operation of its bus lines entirely within incorporated cities and the fares of passengers who rode the five interurban bus lines but whose rides were wholly within the limits of incorporated cities, however, were not subjected to tax. Only those gross receipts which appellant received from passen-

[1] California Revenue and Taxation Code, sections 9601 to 10501, inclusive.

[2] California Revenue and Taxation Code, section 9653.

gers, each of whom on one continuous trip traversed public highways in both incorporated and unincorporated territory, were included in the measure of the challenged tax.

Appellant's primary contention in the lower courts was that the statute should be so interpreted as to permit an apportionment of the fare of a passenger who was transported through both incorporated and unincorporated territory in a single trip according to the mileage traveled in each territory, the portion relating to travel in the unincorporated area only being subjected to tax. This contention, together with a method of apportionment suggested by appellant purporting to achieve such a result, was rejected by the lower courts.

The main burden of appellant's position here, however, is that the statute is discriminatory and unconstitutional in its application to it. We respectfully submit that these contentions also properly were rejected by the lower courts and are not substantial.

(1) *The tax treatment received by appellant was identical to that received by all other operators subject to the tax.*

It is to be noted first that the record in this action is devoid of any evidence that appellee State Board of Equalization has applied the tax to any other operator subject to this law in any manner different from its application of the law to appellant. On the contrary, the testimony of the California Transportation Tax Administrator to the effect that all bus line operators in California, including operators of bus lines in urban areas similar to that existing in the vicinity of San Diego, have been required to report and pay the tax in the same manner as was the appellant, was uncontradicted.[3]

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[3] Rep. Tr. p. 76, l, 17.
p. 78, l, 13.

(2) *Appellant has not demonstrated that it has suffered discriminatory or unconstitutional tax treatment.*

Appellant's assignment of errors is grounded upon the premise that the Motor Vehicle Transportation License Tax Law is a revenue measure designed to provide revenue for the State with which to maintain and repair public highways outside of incorporated cities. From this it argues that since it allegedly uses the highways less than certain other operators it should pay proportionally less tax than the other operators.

There are several fallacies in appellant's argument.

While the Motor Vehicle Transportation Tax Law may be generally classified as a highway-user tax, it is obvious that the tax is not exclusively related to highway use. Apt illustrations of taxable receipts from non-highway use are to be found in the factual situations presented in such cases as *Bekins Van Lines, Inc.* v. *Johnson* (1942), 21 Cal. (2d) 135, 130 P. (2d) 421, and *Southern California Freight Lines* v. *State Board of Equalization* (1945), 72 Cal. App. (2d) 26, 163 P. (2d) 776, where revenues from loading and unloading activities and pick-up and delivery service within incorporated cities were required to be included in the measure of the tax. Appellant has failed to give any cognizance to the receipts from terminal and other special services of operators which are and properly may be included in the tax base.

Little force remains, therefore, behind appellant's contention of unjustifiable discrimination as compared with Pacific Greyhound Lines and other operators, for the record is barren of any evidence indicating that such other operators are not subjected to tax to the same or greater extent upon receipts derived from other than highway use. In addition, appellant presented no comparative rate schedules or other evidence demonstrating that in fact it bore a

greater burden of tax than did other operators. In other words, appellant has not established that other persons in the same class have not paid taxes of equivalent burden. *Pacific Express Co.* v. *Seibert* (1892), 142 U. S. 339.

(3) *The Supreme Court of California has held there are no constitutional objections to the law as applied to appellant's operations.*

The constitutionality of the taxing statute as interpreted and applied herein has been considered on several occasions by the California Supreme Court. In the case of *In Re Bush* (1936), 6 Cal. (2d) 43, 56, 56 P. (2d) 511, 517, the Court said:

> "No valid complaint can be made that the act is unconstitutional by virtue of the fact that section 14 thereof exempts from its operation motor vehicles operated exclusively within incorporated cities or towns and also motor vehicles operating between incorporated cities or towns where no portion of the public highway outside of the corporate limits of said cities or towns is traversed in said operation. Similar provisions in the 1923 and 1925 acts were upheld in *Bacon Service Corp.* v. *Huss, supra,* ((199 Cal. 21, 248 Pac. 235)) and in *In re Schmolke, supra* ((199 Cal. 42, 248 Pac. 244)). The tax is placed upon those obtaining compensation for use of the public highways. *The fact that petitioner by reason of his operations upon the public highways outside the incorporated cities or towns is unable to bring himself within the exemption of said act, with the result that he is required to pay a tax based upon both his operations outside the incorporated cities and towns and also within the cities and towns, whereas those who bring themselves within the exemption are not required to pay a tax upon their city operations is not fatal to the validity of the act.* Some inequalities are bound to occur even in classifications which are manifestly fair and just." (Emphasis supplied.)

An appeal to this Court in *Bacon Service Corp.* v. *Huss*, was dismissed on December 12, 1927 (275 U. S. 507), similar action previously having been taken with regard to the case of *In re Schmolke* by this Court on December 6, 1926 (273 U. S. 646).

In the case of *Bekins Van Lines, Inc.* v. *Johnson* (1942), 21 Cal. (2d) 135, 141-142, 130 P. (2d) 421, 424, the California Supreme Court reaffirmed its views as follows:

> "There is no constitutional objection urged or which could be urged to the application of the plain language of the act. All the required safeguards have been afforded by the Legislature in the exercise of its taxing power. No unreasonable discriminations are involved and in the absence of any such unlawful classification the act is constitutional."
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> • • • • • • •
>
> "No invalidity may be said to attach by reason of the fact that the plaintiff here is taxed on its intra-city pick-up and delivery service in connection with its intercity hauls as distinguished from its strictly intra-city business. (In re Bush, supra.)"

(4) *The cases cited by appellant are inapplicable.*

The only cases cited by appellant clearly are inapplicable to the problem at hand.

It was held in *Liggett* v. *Lee* (1933), 288 U. S. 517, that the equal protection clause forbade the imposition of a higher tax upon a chain operating in more than one county than a chain operating with the same number of outlets all in the same county. If appellant were complaining that it was subject to discrimination in that a higher tax was imposed upon it than others who operated wholly within a city, the *Liggett* case possibly would be of some interest, although of little value in view of such decisions as *Aero Mayflower Transit Co.* v. *Georgia Public Service Commission* (1935),

295 U. S. 285. But appellant's complaint here is that it pays more tax than other intercity operators. As we have seen, the record is devoid of any evidence which would support such a position.

Continental Baking Co. v. *Woodring* (1932), 286 U. S. 352, involved a Kansas statute which exempted carriers operating wholly within cities and private carriers operating within a radius of twenty-five miles from the city limits. The Kansas tax administrators construed the exemption to mean that if a private carrier went beyond the twenty-five mile limit, the excess mileage would be used as the measure of the tax. The Court discussed this construction only in connection with an objection made as to the uncertainty of the statute stating specificaly at page 366 that the objection was ". . . distinct from that of unconstitutional discrimination".

Conclusion

Appellant's argument could better be submitted to the Legislature of the State than the courts. For if bus line operators in interurban areas are to receive a different application of the law than other types of operators who are subject to the Motor Vehicle Transportation License Tax Law, we submit that the Legislature is the branch of the government which must establish such special treatment. *Dane* v. *Jackson* (1921), 256 U. S. 589.

The appellant has been unable to bring itself within the legislative exemption from the tax; it has been required to pay its tax in exactly the same manner as all other taxpayers similarly situated; and it has not demonstrated that it has suffered discriminatory or unconstitutional tax treatment. For these reasons, we respectfully submit that a substantial federal question has not been presented and respectfully request that this appeal be dismissed or, in the alternative, that the judgment of the District Court of

Appeal of the State of California in and for the Third Appellate District be affirmed.

Respectfully submitted,

FRED N. HOWSER,
Attorney General of the State of California;
JAMES E. SABINE,
Deputy Attorney General of the State of California;
IRVING H. PERLUSS,
Deputy Attorney General of the State of California,
Counsel for Appellee.

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No. 785. San Diego Electric Railway Co. *v.* State Board of Equalization. Appeal from the District Court of Appeal, Third Appellate District, of California. *Per*

Curiam: The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *William L. Holloway* and *C. Coolidge Kreis* for appellant. *Fred N. Howser*, Attorney General of California, *James E. Sabine* and *Irving H. Perluss*, Deputy Attorneys General, for appellee. Reported below: 89 Cal. App. 2d 267, 200 P. 2d 573.

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